STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 11, 2008
v	No. 278003 Jackson Circuit Court
MICHAEL CHRISTOPHER ACKLEY, Defendant-Appellant.	LC No. 06-003878-FH

Before: Donofrio, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

Defendant was convicted by a jury of mingling a poison or harmful substance with food or drink, MCL 750.436(2)(a), and was sentenced by the trial court to a prison term of 2 to 15 years. He appeals as of right. We affirm.

Defendant's conviction arises out of Jessica Meade's ingestion of D-Con, a rodent poison. Meade had an on-again-off-again relationship with defendant and they had a daughter together. On July 29, 2006, defendant was visiting his daughter at Meade's apartment when Meade asked him to bring her a glass of Pepsi and a bowl of cereal. Meade became ill after drinking some of the Pepsi and eating a few spoonfuls of the cereal. Meade poured herself a glass of Pepsi the following day and noticed granules at the bottom of the Pepsi bottle. She poured some the Pepsi into the sink and scraped the granules into a Tupperware container. She then took the Pepsi bottle and the container with her to the hospital and was informed that the substance appeared to be D-Con. Defendant subsequently admitted that the substance was D-Con.

Defendant first argues that the trial court violated his due process right to present a defense by excluding purported evidence that the Pepsi would have looked noticeably different if defendant had put D-Con in the Pepsi bottle. We disagree. We review a trial court's decision regarding the admission of evidence for an abuse of discretion. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *People v Carnicom*, 272 Mich App

614, 617; 727 NW2d 399 (2006). Further, we review constitutional questions de novo. *People v Bassage*, 274 Mich App 321, 324; 733 NW2d 398 (2007).[1]

During trial, defendant attempted to present evidence that combining D-Con with Pepsi would have caused a readily observable chemical reaction. The trial court properly excluded the evidence. As the court determined, there was no way of knowing whether the conditions of the proposed in-court experiment were the same as those pertaining to the Pepsi bottle at Meade's apartment. The record shows that the Pepsi bottle sought to be used for the in-court experiment was considerably fuller than the bottle at Meade's apartment. In addition, the bottle sought to be used in court was room temperature and Kelsey Brown, who was also at Meade's apartment on the day of the incident, testified that she heard defendant get the Pepsi bottle from Meade's refrigerator. Moreover, it is unknown how much D-Con was put into the bottle at Meade's apartment, the length of time the chemical reaction lasted, whether the Pepsi would have appeared "normal" after a certain amount of time, and when the D-Con had been combined with the Pepsi at Meade's apartment. It is possible that, even if an immediate chemical reaction would have been readily apparent, no such reaction would have been noticeable by the time that Meade drank the Pepsi. Therefore, because defendant could not replicate the conditions involving the Pepsi bottle at Meade's apartment, the trial court did not abuse its discretion by excluding the proposed evidence.

Defendant next argues that he was denied his right to due process when the prosecutor failed to obtain and present exculpatory evidence. We disagree. Because defendant did not preserve this issue for appellate review, our review is limited to plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999); *People v Knapp*, 244 Mich App 361, 375; 624 NW2d 227 (2001). Reversal is warranted only if the error resulted in conviction despite defendant's actual innocence or if it seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of his innocence. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004).

"A criminal defendant has a due process right of access to certain information possessed by the prosecution." *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998). This right pertains to evidence that "might lead a jury to entertain a reasonable doubt about a defendant's guilt." *Id.* Neither the prosecutor nor the police, however, are required to seek and find exculpatory evidence. *People v Burwick*, 450 Mich 281, 289 n 10; 537 NW2d 813 (1995); *People v Sawyer*, 222 Mich App 1, 6; 564 NW2d 62 (1997).

Defendant argues that the prosecutor was required to obtain handwriting samples from Meade's everyday life so that a handwriting expert could have compared those samples to a

[1] We reject the prosecutor's argument that, to properly preserve this issue for appellate review under MRE 103(a)(2), defendant was required to make an offer of proof regarding what would have occurred had the trial court permitted him to put D-Con in the Pepsi bottle during trial. MRE 103(a)(2) does not require an offer of proof when the substance of the evidence sought to be admitted is apparent from the context of the questioning. Here, defendant's theory that the Pepsi would have looked substantially different if D-Con had been mixed with it was apparent from the record.

letter allegedly written by Meade. Defendant presumes that such evidence would have exculpated him by showing that Meade wrote the letter. Even assuming that the handwriting samples would have been exculpatory, however, the prosecutor was not required to seek exculpatory evidence. *Burwick*, *supra* at 289 n 10; *Sawyer*, *supra* at 6. Therefore, defendant's argument fails.

Defendant next contends that he was denied his rights to due process, a fair trial, and against self-incrimination when the trial court admitted into evidence recorded telephone conversations containing involuntary incriminating statements. We disagree. We review a trial court's factual findings at a suppression hearing for clear error. *People v Jenkins*, 472 Mich 26, 31; 691 NW2d 759 (2005). We further review de novo the trial court's ultimate decision on a motion to suppress. *People v Williams*, 472 Mich 308, 313; 696 NW2d 636 (2005).

The use of a criminal defendant's involuntary statement against him at trial violates his due process rights. *Mincey v Arizona*, 437 US 385, 397-398; 98 S Ct 2408; 57 L Ed 2d 290 (1978). In determining whether a statement was freely and voluntarily made, this Court reviews the totality of the circumstances surrounding the making of the statement. *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988); *People v McPherson*, 263 Mich App 124, 137; 687 NW2d 370 (2004). In determining voluntariness, a court must consider a defendant's mental limitations and determine whether, "through susceptibility to surrounding pressures or inability to comprehend the circumstances," the defendant's confession was not the product of his own free will. *People v Belknap*, 146 Mich App 239, 241; 379 NW2d 437 (1985). There must exist '"a substantial element of coercive police conduct,'" if a court determines that a confession is not '"voluntary'" within constitutional limitations. *People v Wells*, 238 Mich App 383, 388; 605 NW2d 374 (1999), quoting *Colorado v Connelly*, 479 US 157, 164, 167; 107 S Ct 515; 93 L Ed 2d 473 (1986).

Here, the totality of the circumstances showed that defendant's inculpatory statements were voluntary. During Meade's telephone conversations with defendant, he admitted that he knew that the conversations were being recorded, and he initially refused to tell Meade what he had put in the Pepsi. After hanging up and calling Meade back, he admitted that the substance was D-Con, despite continuing to accuse Meade of recording the conversation. He also admitted that he had been around "a lot of crime activity" in his life and that he knew "how things work." Nothing in the recorded conversations tends to support defendant's argument that his statements were involuntary, particularly considering that defendant initiated the phone call during which he admitted that the substance was D-Con. Therefore, the trial court did not commit clear error by finding that defendant's statements were voluntary.

Defendant's argument that he was denied his right to counsel at the time that his telephone conversations with Meade were recorded is similarly meritless. A defendant's Fifth Amendment right to counsel attaches only when he is subjected to custodial interrogation.[2]

[2] Defendant's Sixth Amendment right to counsel was not implicated because the recorded telephone conversations occurred before the initiation of adversarial judicial proceedings. See *People v Hickman*, 470 Mich 602, 607; 684 NW2d 267 (2004).

Michigan v Jackson, 475 US 625, 629; 106 S Ct 1404; 89 L Ed 2d 631 (1986). Whether a suspect is in custody is determined by the totality of the circumstances. *People v Mayes (After Remand)*, 202 Mich App 181, 190; 508 NW2d 161 (1993). "The key question is whether the accused reasonably could have believed that he was not free to leave." *Id.*

Here, defendant could not have reasonably believed that he was not free to end the telephone conversations. He was in his own home and was not threatened or otherwise coerced into continuing the conversations against his will. In fact, after he and Meade ended one of the conversations, defendant immediately telephoned Meade back to continue their discussion. Thus, contrary to defendant's argument, he was not in custody during the conversations and his Fifth Amendment right to counsel did not attach. *Jackson, supra* at 629.

Defendant next contends that the trial court denied him his due process right to a fair trial by excessively interfering with his witnesses' testimony and assuming a prosecutorial role. We again disagree. Because defendant did not preserve this issue for appellate review by objecting to the trial court's questioning of witnesses in the trial court, our review of this issue is limited to plain error affecting his substantial rights. *Carines, supra* at 763, 774; *Knapp, supra* at 375.

A trial court has wide, but not unlimited, discretion regarding the conduct of trial. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). A court's excessive interference with the examination of witnesses or disparaging remarks directed at defense counsel may deny a defendant a fair trial. *People v Davis*, 216 Mich App 47, 50; 549 NW2d 1 (1996). "The test is whether the judge's questions and comments may have unjustifiably aroused suspicion in the mind of the jury concerning a witness' credibility and whether partiality quite possibly could have influenced the jury to the detriment of the defendant's case." *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996). Further, "[p]ortions of the record should not be taken out of context in order to show trial court bias against defendant; rather the record should be reviewed as a whole." *Paquette, supra* at 340.

Here, defendant cites isolated portions of the record and takes the trial court's comments out of context. Defendant specifically relies on the court's comments to certain defense witnesses. The record shows that the court's remarks to Marlena Hands, viewed in context, directed Hands to listen to the entire question before answering because she had repeatedly interrupted the prosecutor and offered answers before the prosecutor was finished asking questions. In addition, the court's instruction to Carolyn Weatherwax directed her to respond only to the question asked and not to offer additional information as she had been providing to previous questions.

Further, defendant challenges the trial court's inquiry of defense witness Danny Norman regarding whether there was any D-Con at the restaurant at which he and defendant worked. The record shows, however, that the court similarly inquired of Meade by asking her whether she kept D-Con in her apartment. Moreover, both witnesses responded negatively. Thus, the question did not prejudice defendant.

Finally, defendant challenges the trial court's inquiry asking why he referred to "mice" during the recorded telephone conversations with Meade. Defendant takes the trial court's remarks out of context. The court inquired as follows:

THE COURT: Well, you heard the tape that was played of all these conversations, wasn't there something in there where she's trying to blame you for what it was that was put in her stuff and you said something like, "You know, mice." Do you remember the word "mice" coming up, or mouse?

THE WITNESS: Yeah.

THE COURT: Why would you say that?

THE WITNESS: Cuz basically she threw up in my face. She knew what it was cuz we talked about it cuz she called the restaurant and said poisoning and she told my mom that and my mom come back and told me and I called her back as I was at the restaurant and asked her what she's talking about. She tells me that someone put something in a drink, I said, "How could that be when the last time I was there would have been a Wednesday," and she's like, "Well, I'm gonna say it's you and I'm gonna tell that to the cop that it was you."

THE COURT: No, but here's my question, the word "mice" was on that tape.

THE WITNESS: Yeah.

THE COURT: In one of the conversations, right? You're the one that said the word "mice," right?

THE WITNESS: Yes.

THE COURT: Where did that come from? She's asking you what it was that was put in her drink and you say "mice." Isn't that the way you heard it?

THE WITNESS: Yeah.

THE COURT: Why did you respond "mice?"

THE WITNESS: She needed to know what something was and I was telling her.

THE COURT: How would you know what it was?

THE WITNESS: Cuz we talked about it.

THE COURT: But then she already knows what it is, why would she be asking you?

THE WITNESS: Cuz she said she forgot.

THE COURT: She forgot. Okay. And then later on after that she's asking for a specific name, right?

THE WITNESS: Yeah.

THE COURT: I got to know because the kid's got a rash and, you know, the doctor has to know specifically what it is.

THE WITNESS: Yes.

THE COURT: And then you say, "D-Con."

THE WITNESS: Yes.

THE COURT: All right. Anything additional, Ms. O'Briant [defense counsel]?

As the colloquy shows, the trial court's questioning allowed defendant an opportunity to explain his reference to D-Con on the recording while maintaining that he did not put D-Con in Meade's food or drink.

In addition, defendant's contention that the trial court did not similarly question the prosecution's witnesses is unfounded. The record shows that the court asked several questions of the prosecutor's witnesses as well as defense witnesses. Defendant has not shown that the trial court's questions may have unjustifiably aroused suspicion in the jurors' minds regarding witness credibility or that judicial partiality could have influenced the jury to defendant's detriment. *Cheeks*, *supra* at 480. Accordingly, he has failed to establish plain error.

Defendant next argues that he was erroneously scored ten points under offense variable (OV) 3. Because the trial court departed from the sentencing guidelines range, however, any error with respect to the scoring of OV 3 was harmless. The trial court specifically indicated its intent that defendant's sentence be upheld if any of its reasons for departing above the guidelines do not survive appellate review. Defendant does not challenge the trial court's reasons for departing above the guidelines range. Therefore, we affirm defendant's sentence. *People v Mutchie*, 468 Mich 50, 51-52; 658 NW2d 154 (2003).

Affirmed.

/s/ Pat M. Donofrio
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald